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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

This brief *amicus curiae* is respectfully submitted on behalf of *amicus curiae* Pacific Legal Foundation (hereinafter PLF) pursuant to Supreme Court Rule 42. Consent to the filing of this brief has been granted by counsel for both parties and has been filed with the Clerk.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affect-

ing the broad public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

The Pacific Legal Foundation, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument of the public interests at stake in determining whether the equal protection of the laws extends to all persons without regard to race, color, or national origin.

OPINION BELOW

The opinion of the California Supreme Court is reported at 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976).

ARGUMENT

I

THE SPECIAL ADMISSIONS PROGRAM AT THE DAVIS MEDICAL SCHOOL IS AN ATTEMPT TO RESURRECT THE DISCREDITED DOCTRINE OF "SEPARATE BUT EQUAL"

As described by petitioner (Brief for Petitioner at 3-6), the admissions program at the medical school of the University of California at Davis consists of two separate programs, the Task Force or special admissions program and the general admissions program. Approximately 84-85 percent of each entering

class is chosen by the general admissions program, while 15-16 percent is chosen by special admissions. Applicants to either program are evaluated against essentially the same criteria of Medical College Admission Test score, grade point average, performance in a series of interviews, and other factors such as recommendations, work experiences, community activities, etc. However, the standards of acceptance under the two programs are different and admittees under the special admissions program often have significantly lower test scores, grades, and other ratings than those admitted through general admissions. In fact, some candidates under special admissions are considered despite low grade point averages that would completely exclude them from consideration under the general admissions program. Only members of racial minorities may apply through the special admissions program; all others must rely upon general admissions.

In 1896 the United States Supreme Court construed the Fourteenth Amendment to sanction state statutes requiring Negroes and whites to ride in separate railroad cars. *Plessy v. Ferguson,* 163 U.S. 537 (1896). The Court stated that:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.* at 544-45.

The pernicious doctrine of "separate but equal" created by *Plessy* persisted for 58 years before it was finally rejected by the Court in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954). Prior to *Brown*, the doctrine was questioned in the context of graduate professional education, but in each case the Court found that the particular separate facilities and procedures were unequal and thus invalidated them without need to overrule *Plessy. Sweatt v. Painter,* 339 U.S. 629, 636 (1950); *McLaurin v. Oklahoma S. Regents,* 339 U.S. 637 (1950); *Sipuel v. Board of Regents,* 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938). In *Missouri ex rel. Gaines,* while upholding separate but equal educational facilities, the Court stressed the duty of the states to maintain equality:

> "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right." 305 U.S. at 349.

In *Brown, supra,* the Court again emphasized the extreme importance of education in modern American society and reiterated that the opportunity for education, "where the State has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. at 493. Finding that "separate educational facilities are inherently unequal," the Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place." *Id.* at 495.

The special admissions program at the Davis Medical School is an attempt to turn the calendar back to 1896 and *Plessy* and to reestablish separate methods for admitting persons to medical school based upon race. The special program would not pass muster even under pre-*Brown* case law because it applies the same criteria in unequal ways and thus breaches the state's duty to make educational opportunities available on equal terms. The program is even more clearly improper under *Brown's* holding that even "separate but equal" programs have no place in public education. The holding in *Brown,* although directed at segregation in general, is equally applicable to segregated admission procedures. As pointed out by Mr. Justice Douglas:

> "A segregated admissions process creates suggestions of stigma no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions." *DeFunis v. Odegaard,* 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

In the instant case, the use of a segregated admissions process resulted in Allan Bakke being refused admission to the medical school solely on the basis of race. As the University admits, students admitted under the special process often had lower test scores, grades, and general rating than Bakke. (Brief for Petitioner at 6.) They were admitted because they were judged under a less rigorous process, while Bakke was rejected because he had to compete within the more rigorous general admissions program. Bakke was thus discriminated against on the basis of race.

II

DISCRIMINATION RESULTING FROM THE USE OF SEPARATE AND UNEQUAL ADMISSION PROCEDURES DEPENDENT ON RACE IS A VIOLATION OF EQUAL PROTECTION AND MUST BE INVALIDATED UNDER THE FOURTEENTH AMENDMENT

Special admissions programs such as that in the instant case are often justified as a form of "benign" discrimination necessary to aid a specially disadvantaged group. It is contended that as such these programs are not within the normal reach of the Fourteenth Amendment or subject to the same scrutiny as other programs based on racial classifications. However, the issue here is not whether certain needy persons can be aided, but whether other persons can be discriminated against solely on the basis of race in any process consistent with the Fourteenth Amendment.

The first interpretation of the meaning of the Fourteenth Amendment came in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 81 (1873), where the Court recognized that the evil to be remedied by the Amendment was state laws "which discriminated with gross injustice and hardship" against Negroes as a class. The Court went on to say that:

> "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

However, not long thereafter in the *Civil Rights Cases,* 109 U.S. 3, 24 (1883), this Court rejected that limitation:

> "The 14th Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class or to any individual, the equal protection of the laws."

In *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886), it was stated even more emphatically that:

> "These provisions [14th Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

The Fourteenth Amendment guarantee of equal protection of the laws has thus come to be extended to all persons of whatever race, class, or nationality. It is incomprehensible that at this late date anyone would contend that the Fourteenth Amendment grants equal protection to one person but not to another because of a difference in race. To state such an argument is to refute it. Equal protection dependent on race is no longer equal protection. Therefore an admissions program which excludes certain persons on account of their race is a violation of equal protection whether the excluded person is white, black, red, or yellow. Discrimination is discrimination no matter at whom it is directed. Discrimination must be viewed from the standpoint of the person discrim-

inated against and when so viewed it is never benign. Programs which give special aid to disadvantaged groups or individuals may be generally valid, but when they cease merely to aid one person and result in deprivation to other persons they are discriminatory, not "benign," and not valid unless justified under strict standards of review. This is so because the guarantee of equal protection under the law is individual and personal—it makes no racial distinctions.

In *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948), this Court pronounced:

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." (Footnote omitted.)

This Court has also stated:

> "It is the individual . . . who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers." *Mitchell v. United States,* 313 U.S. 80, 97 (1941). (*See also Missouri ex rel. Gaines,* 305 U.S. at 351.)

This is the view that must be taken of the Fourteenth Amendment, for discrimination is always personal and individual to the person that suffers it. It is no consolation to that person to know that his race as a whole may or may not have been subject to similar deprivation. What the individual of any race demands and deserves is equal protection from discrimination.

In recent cases, this Court has demonstrated an awareness of the need to protect all persons from unfair racial discrimination. *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976), held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (1970), and 42 U.S.C. § 1981, statutes enacted pursuant to Section 5 of the Fourteenth Amendment apply equally to racial discrimination against whites or blacks. In that case, this Court upheld the right of white employees to allege that they had been discriminated against on the basis of race. In *International Brotherhood of Teamsters v. United States,* 45 U.S.L.W. 4506, 4513 (1977), this Court interpreted Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1970), to protect *bona fide* seniority systems and to allow incumbent "employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees." The legislative history of the Act was found to show an intent to avoid reverse discrimination against employees with seniority privileges.

The seriousness of discrimination based on race has also caused this Court to declare that:

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

As suspect classifications subject to strict scrutiny, racial distinctions must be shown to be " '*necessary* to promote a *compelling* governmental interest.' " (*Dunn*

v. Blumstein, 405 U.S. 330, 342 (1972)), or they are invalid under the equal protection clause of the Fourteenth Amendment. "And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Id.* at 343. Thus, there is a heavy burden on the state to justify both its ends and the means used to that end. The ends must be a "compelling governmental interest," and the means the best, least burdensome possible.

This is the standard by which all laws and official conduct leading to racial discrimination must be evaluated. In *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973), Mr. Justice Powell indicated that one of the traditional *indicia* of suspectness is a class saddled with disabilities, subjected to a history of purposeful unequal treatment, or relegated to a position of political powerlessness. Other *indicia* include distinctions based upon immutable characteristics "determined solely by the accident of birth" and the imposition of burdens without regard to individual responsibility or wrongdoing. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972); *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). These are the conditions which prompt the court to first make a classification constitutionally suspect. It is because racial classifications are based upon an accident of birth having no relation to individual responsibility and because such classifications can be used to deny certain classes political and social equal-

ity that such classifications are suspect and subject to strict scrutiny. But once this strict standard of equal protection has been extended to racial classifications it must apply equally to all discrimination based on race. All individuals must be granted the same degree of protection because the Fourteenth Amendment guarantees are individual and personal. *Shelley,* 334 U.S. at 22.

To require strict scrutiny of discrimination against members of certain races while subjecting discrimination against members of other races to less rigid examination is in itself a denial of equal protection of the laws. It is to say that a "compelling interest" is necessary to justify racial discrimination against one citizen, while only a "rational basis" will justify the same discrimination against another. This is not only constitutionally untenable, but socially dangerous. We do not know what groups and individuals will be subject to oppression at different times. To give equal protection an "accordion-like quality" breaks down our notions of equality and justice and postpones the day when racial inequities will be left behind us.

In *Loving v. Virginia,* 388 U.S. 1 (1967), it was argued that a state antimiscegenation statute did not violate the equal protection clause because it applied equally to both whites and blacks. This Court rejected that argument stating that:

> "[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by *any* statute constitute an arbitrary and invidious discrimination." *Id.* at 10 (emphasis added).

Since the statute "rest[ed] solely upon distinctions drawn according to race," it was subject to strict scrutiny and was invalidated. The fact that it applied equally to both races made no difference. *Accord, McLaughlin v. Florida,* 379 U.S. 184 (1964); *Shelley v. Kraemer,* 334 U.S. 1 (1947). The Court in *Shelley* stated that:

> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." 334 U.S. at 22.

And in the reverse discrimination case of *DeFunis,* Mr. Justice Douglas maintained that:

> "A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause." 416 U.S. at 333 (Douglas, J., dissenting).

Thus it makes no difference whether a racially discriminatory statute or practice applies only to a member of a minority, or equally to both races, or only to a member of the majority. In each case, the important thing is that an individual is discriminated against solely because of his race. And in each case the statute or practice must be subjected to the strictest scrutiny under the equal protection clause to determine if it serves a compelling governmental interest and is the least constitutionally burdensome means to achieve that interest.

The issue of whether the special admissions program at the medical school of the University of California at Davis withstands the test of strict scrutiny

has been extensively argued below and comprehensively briefed for this Court by the parties. No purpose would be served by a reiteration of that material here. Suffice it to say that the California Supreme Court found that even assuming a compelling interest behind the program, the University had not met "its burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority." *Bakke v. Regents of the University of California,* 18 Cal. 3d at 53. That finding should not be disturbed.

III

THE CONSTITUTIONAL STANDARDS AGAINST WHICH THE UNIVERSITY OF CALIFORNIA'S CONSTITUTIONAL DUTY SHOULD BE MEASURED MUST NOT BE ABANDONED ON THE BASIS OF THE CONCLUSIONARY SOCIOLOGICAL ASSERTIONS OF THE REGENTS

The essence of the Regents' plan for the University of California and of the precedent that they ask this Court to fasten upon the American Republic is the idea that "only a race-conscious plan for minority admissions will permit qualified applicants from disadvantaged minorities to attend medical schools, law schools and other institutions of higher learning in sufficient numbers" (a) to enhance "the quality of education of all students" [except those who are excluded because of the racial discrimination of the University of California], (b) "to broaden the professions" [except for those who are excluded by positive racial discrimination from the University's

medical school], (c) "to destroy pernicious stereotypes" [except for persons who, like the plaintiff Bakke, are not members of the favored minority], and (d) "to demonstrate to the young" [the Regents' brief on the merits would suggest that "old" minority members are not to be in the favored class] that educational opportunities and rewarding careers are "truly open regardless of ethnic origin." (Brief for Petitioner at 13.)

The Regents of the University would ask this Court to engage in the kind of legislative assumption which once was made by the Congress in one section of the Civil Rights Act of 1964. That historical event and its development, totally omitted from the Regents' brief, is of major significance in measuring the societal assertions which the Regents present to this Court.

For over 100 years in the United States, every person has been entitled to equal protection of the law, and in education that principle was translated into a demand for "equal educational opportunity." However, beyond the idea that equal opportunity related to the process which took place in school buildings there was little consensus. (*See* Gordon, *Toward Defining Equality of Educational Opportunity,* in F. Mosteller and D. Moynihan, *On Equality of Educational Opportunity* 423, 427-28 (1972).)

The classical notion of the mid-nineteenth century, with which the first compulsory educational laws were introduced, was that the state was obliged through its educational system to mold a character

acceptable to that part of the adult world able politically to establish community standards. (*See* M. Katz, *The Irony of Early School Reform* 117, *et seq.* (1968).) Another later notion was that the state should provide a school building and incidental supplies with teachers equipped to impart literary and mathematical skills which the pupil might or might not learn. (*See* J. Dewey, *Intelligence in the Modern World* 683-87 (1939).) Later, the emphasis shifted from the school to the child and resulted in changes in teaching methods, but the object remained to maximize individual potential. (*See* L. Cremin, *Transformation of the School* (1961).) Everyone had an "opportunity" to learn. If the hardware was equal, the opportunity was equal. No one was surprised that outcomes were different because it long had been understood that individuals have different talents, aptitudes, and interests.

In 1964, however, the Congress of the United States made a legislative assumption that those views or interpretations of "equal educational opportunity" were incorrect and that the United States Office of Education should make a survey and report "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion or national origin in public educational institutions." Pub. L. No. 88-352, § 402, 78 Stat. 247. To that Congress, a lack assumed was a lack predictably to be found. But when the Office of Education survey team, headed by James S. Coleman, returned its report in 1966, the lack found was not that

expected by the Congress. U. S. Office of Education, Department of Health, Education, and Welfare, *Equality of Educational Opportunity* (1966).

Prior to the Coleman Report, it was believed that schools which Negro children attended would prove to have inferior facilities. Coleman found that was not the case. F. Mosteller and D. Moynihan, *On Equality of Educational Opportunity* 8-12 (1972). Furthermore, it was found that the range of performance within each school was greater than school-to-school variations, at all grade levels, for all racial and ethnic groups. *Coleman Report* at 296. From Coleman's findings, one could reasonably conclude that no one was being shortchanged by the nation's public school system, at least within large geographic regions, and that everyone was being afforded an opportunity to maximize whatever academic potential he brought to school with him. (*See* F. Mosteller and D. Moynihan, *supra* at 11-12.)

The contrast between the actual findings of the Coleman Report and the "historical certainty" which formed the basis for its legislative creation should cause the Regents of the University of California to pause before making their broad social allegations and engaging in their historical revanchism. That contrast also dictates that this Court should not use the simplistic assertions of the Regents as a basis for constitutional decision making.

The surprising findings of the Coleman Report were supported in another important analysis, in which comparisons of black-white and male-female

salary differentials, made by examining salary differentials for blacks and whites (and males and females) with comparable training and credentials within the numerous academic areas of specialization, were developed. Holding the variables constant, the findings showed that salaries of black academics equalled or surpassed those of white academics, both before the application of numerical "goals and timetables" in 1971 and four years after, and that there was no support for the contention that male-female career differentials were the result of discrimination by employers. (*See* Sowell, Thomas, *Affirmative Action Reconsidered* (A.E.I. 1975).)

The Coleman Report did, however, furnish a toehold for redefining "equal educational opportunity." (*See* F. Mosteller and D. Moynihan, *supra* at 6-7.) In the school districts studied, a statistical disparity was found between the median test scores of Negro pupils and the median test scores of white pupils. *Coleman Report* at 20-21. Since the samples of the Negroes studied did not perform as well on the average as the samples of whites on the particular standardized tests provided, an educational lack was assumed to be the cause. Therefore, "equal educational opportunity" could now be redefined as educational "outcomes" by racially defined groups. Disparity in the median achievement tests could now be used to estabish "group inequality."

In a similar manner, the petitioner's brief seems to suggest that a statistical disparity between the numbers of whites and blacks in the Davis Medical School

establishes a history of past discrimination which justified the use of "reverse discrimination" in admissions to create a racial balance. However, this is contrary to the direction of the Civil Rights Act of 1964 (*see* U. S. Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964* 3005-06, 3015, 3131, 3134, 3160) and to the requirements of the Fourteenth Amendment to the Constitution of the United States. In the recent case of *Washington v. Davis,* 426 U.S. 229, 239 (1976), this Court indicated that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." This Court further stated: "That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." *Id.* at 240. Disproportionate racial impact is not unconstitutional by itself; a purpose or intent to discriminate must be shown under the Fourteenth Amendment. There is, therefore, nothing to sanction the University's use of past statistical disparities to justify present discriminatory admissions procedures. On the contrary, since the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race" (*id.* at 239), the Fourteenth Amendment prohibits the University's intentional discrimination against majority members like the respondent Bakke.

The assertion by the Regents that a race-conscious plan will enhance the quality of education of all students is nothing more than a preoccupation with peer-group relationships, in which it is believed that what most relates to performance is the characteristics of other students.

A different view is embodied in the work of Irwin Katz, who found that Negroes perform best in interracial situations free of social and failure threat, moderately well in an all-Negro situation, and worst in interracial situations characterized by social and failure threat. Katz, *Review of Evidence Relating to Effects of Desegregation of Negroes,* 19 Am. Psychologist 391 (1964).

In fact, no one knows whether the statistically significant "minority student" will act like the cooperative model vaguely projected by the Regents' brief in this Court. (*See* B. Bettelheim and M. Janowitz, *Social Change and Prejudice* 87 (1964); H. Heckhausen, *Anatomy of Achievement Motivation* 31, 160-61 (1967); C. Silberman, *Crisis in the Classroom* 285 (1970); Allport, *The Nature of Prejudice* 280, 395-457 (1954); Advisory Committee to the Department of Housing and Urban Development, National Academy of Sciences, *Freedom of Choice in Housing: Opportunities and Constraints* (1972).)

The possible harm which could result from the policies which the University of California urges may be as great as that resulting from segregation laws and the deliberate exclusion by race which ac-

companied those laws. Self-perception is a tricky business, as the existence of the profession of psychiatry attests. We do not presume to guess about the self-perception of all minority students or all of any other kind of students. The myths concerning Negroes of even thirty years ago seem absurd today. (*See* G. Myrdal, *An American Dilemma* 106-08 (1944); J. Barzun, *Race: A Study in Superstition* (1937).) And, old myths are merely replaced by new myths. (*See* K. Clark, *Dark Ghetto* 129-33 (1965) (criticizing the current cultural deprivation theory); E. Erikson, *Identity: Youth and Crisis* 304 (1968) (stating in the context of race that "[a] clinician may be forgiven for questioning the restorative valve of an excessive dose of moral zeal.") *See also* A. Murray, *The Omni-Americans* 98-112 (1972); P. Schrag, *Village School Downtown* 171-72 (1967); M. Katz, *Class, Bureaucracy, and Schools* 111-12 (1971).) But the University of California might reasonably ask, one would hope, whether a "minority" student's self-perception might in some instances be damaged by the University's student admissions policies which tell him that too much association with those who formed the principal part of his life to the date of his admission to medical school will retard his intellectual development. And the University of California might also well ask itself whether a student admission policy based upon an invidious and misleading statistical comparison of the median achievement level of one racially defined group with the median achievement level of another might damage the self-perception of some students, and especially students who seek admission to the demanding profession of medicine.

Policies based upon such an invidious comparison would in any case serve to mark "minority" pupils by race as members of a group from which not much can be expected. The University itself should know that performance is often affected by expectations. (*See* R. Rosenthal and L. Jacobson, *Pygmalion in the Classroom* (1968).) The University of California does not seek escape from the mechanism by which that effect occurs. It seeks, rather, to reenforce it. The University of California would choose to ignore the likely effect of its own panacea upon expectations from "minority" students in medical school and the damage it inflicts upon all students.

Since neither law, nor reason, nor science, nor the arguments of the University of California offer anything to justify the racial quotas in this case as legally cognizable classifications for the assignment of state benefits or burdens, such quotas must be found to be constitutionally deficient.

CONCLUSION

The rationale of placing the rule of law above the rule of men is to avoid the human temptation to achieve benign ends through invidious means. If equal protection of the laws is to maintain its constitutional integrity, it must apply to each individual

regardless of race, color, or national origin. For this reason, *amicus curiae* Pacific Legal Foundation urges that the decision of the California Supreme Court be affirmed.

Respectfully submitted,

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